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WRITS vs. RIGHTS: AN UNENDED CONTEST

IT is desired in the following pages, even at the expense of repeating much that is already common knowledge, to emphasize that as yet we are not done with the formulary system of the common law, despite the fact that codes of civil procedure in most of our states have purported to end the varied and interesting career of forms of action at common law by legislating them out of existence. However, that legislative edict has been about as effective as was the famous, but probably mythical, order of King Canute to the waves of the sea. Certain well-known illustrations of the ineffectiveness of this legislative action are here offered.

One of the inherent dangers in any attempted classification lies in the fact that the classification may come to be considered as more important than the material classified, and that the identity of things may come to be determined by the place into which they may be fitted in some artificial arrangement, rather than by a primary inspection of the things themselves. The system of actions at common law furnishes an excellent example of such a classification which was, and, unfortunately, still is thus misused, even in those states which, having adopted reformed procedure, should find themselves removed from many, even if not all, of the limitations which beset the lawyer under the older system of procedure. So much has been said against the evils of the formalism of common law procedure that it is easy to picture them worse than they really were and useless to attempt to add new criticism. However, it may well be remembered that many of the things that we now term "useless technicalities" were, in their inception, desperate expedients invoked either to prevent the extinguishment of legal rights under the preponderant weight of an artificial classification, or to permit a development, distorted though it often was, of legal ideas

which could not otherwise have been possible. We have no right to criticize the early lawyers who, by one device or another, expanded the action of "case" and multiplied its application in the recognition of new rights, and invented the common recovery, the casual ejector, the promise implied in law and all the long line of fictions, beneficent and otherwise, that mark the progressing development of the early law.¹ But we do have a most decided right to criticize the modern jurist who clings to form after the substance is gone, who takes as a test a classification that once was useful, but which since has ceased to be significant.² To use the language of Professor Pound:³

"Many of the more serious difficulties in our procedure today result from the persistence of ideas and institutions which secured important interests before the development of substantive law as such, and the detailed working out of legal rights, but, in view thereof, have no longer a legislative function."

Our cry should, for example, not be raised against the inventor of fictions, but against him who continues the application of a fiction after it has served every useful purpose, or who diverts it from the strict purpose for which it was created. We must read Bentham's query, "What can you do with fictions that you cannot do without them?" in the present and not in the reflexive tense.⁴ True, as Professor Hepburn says,⁵ posterity was to pay a heavy penalty for the use of these fictions, but it is still arguable that the penalty in question has been greatly enlarged by the constant failure to recognize the fiction for what it in truth is, and by the continual ascription of substance to that which has only form⁶ and was never intended to have anything else. The legal fiction was and is no neces-

¹ See, Mitchell, "The Fictions of the Law," 7 HARV. LAW REV. 264.

² HEPBURN, "DEVELOPMENT OF CODE PLEADING," Introduction xxi.

³ "The Place of Procedure in Modern Law," 1 SOUTHWESTERN LAW REV. 59, 72.

⁴ SMITH, "SURVIVING FITIONS," 27 YALE LAW JOURNAL, 147, 317.

⁵ "DEVELOPMENT OF CODE PLEADING," pp. 25-30.

⁶ Two examples of *contracts implied in law* at once present themselves.

(*) In those states in which a "thing in action not arising out of contract" are by statute not assignable, it is usually held that those torts by which the wrongdoer is enriched give rise to *assignable rights* because the implied promise involved makes them contractual. As stated by one court, referring to such a statutory provision: "Evidently this provision recognizes the limitation which existed at common law when the code was adopted, and, inferentially at least, provides that a chose in action arising out of a *pure tort* is not assignable. . . . The party injured in such a case can waive

sary part of the system of legal classification, but is a result of the unyielding nature of the classification hitherto observed in our law. Fictions should not be considered as having produced dislocations in the anatomy of the law. Instead, they should be recognized as the crutches upon which the law was enabled to limp along, after it had been lamed by the dislocating effect of classifications rendered arbitrary by strict adherence to forms of action at common law.

As duties and obligations were recognized earlier than the rights with which they are usually correlative, it was only natural, perhaps, that the first great division in classification should be between the relationships which a man voluntarily assumes and those which he cannot avoid; the violation of the one class giving rise to contract wrongs, the other producing the field of torts. Even here one must be careful not to be led astray by the *volitional element*, for in perhaps the larger number of torts a man becomes liable because he *willed* to do a certain forbidden act, and care must be taken to apply the test of volition at the only proper place where it may be applied in this field, namely, in the creation of the obligation to act or not to act, in those cases in which there could be no obligation in the absence of an intentional choice to be bound. It must be remembered that, theoretically, this choice must be made as the first step in the new relationship, and that it can, in theory, not occur as a part of the breach of duty or subsequent to the wrong. At the very outset, then, our classification carries an inherent danger that volition in the abstract will be taken as the earmark. This has certainly made it easier to produce anomalous developments in the field of implied promises, so called.

Much of the need of reclassification,⁷ suggested by writers of the present day, can doubtless be ascribed to the habit of retaining obsolete categories derived from ancient procedure. The law is

the tort and sue in contract, and as there was an implied agreement to pay the money, it was treated as a chose in action arising out of a contract and was therefore assignable. (*K. C. M. & O. R. Co. v. Shutt* (1909) 24 Okla. 96, 20 Ann. Cas. 255).

(b) It has become customary for the courts and for writers on quasi-contracts to recognize as a special subject in that field the anomalous "waiver of tort and suit in contract," in which the courts have given life and force to a non-existent agreement. See: KEENER "QUASI-CONTRACTS," Chap. III; WOODWARD, "QUASI-CONTRACTS," Chap. XX; Corbin, "Waiver of Tort and Suit in Assumpsit," 19 YALE LAW JOURNAL, 221; WOODRUFF, "CASES ON QUASI-CONTRACTS," pp. 579-639; KEENER, "CASES ON QUASI-CONTRACTS," Chap. VI; THURSTON "CASES ON QUASI-CONTRACTS," Chap. VI.

⁷ For a discussion of such need, see Smith "Tort and Absolute Liability,—Suggested Changes in Classification," 30 HARV. L. REV. 241, 319, 402.

already over-complex,⁸ and the complexity daily increases. The time is already long past when we should have ceased to add confusion to that complexity, by harking back to spurious or obsolete tests and classifications.⁹ This becomes evident to the reader of the current reports of any of our American jurisdictions, where it is quite usual to find the court pronouncing a right to be *contractual* because it is to be secured or protected by an action, such as at common law would have been designated as an action in *assumpsit*,¹⁰ and declaring that wrong to be *delictal* which could at common law be redressed by one of the recognized *tort actions*.¹¹ With all due deference to the honorable ancestry of our rules of law, it is here submitted that in any such test the cart has been put before the horse, and that such a deductive process is, from a logical standpoint, hardly more satisfactory than the old example, which was familiar to all of us when in college. "A horse has four legs. The animal which I see before me has four legs. It is, therefore, a horse."

Conceivably this method of thought belongs in the same class with that type of mental habit,¹² which makes a fetish of certain combinations of words, and continues, long after they have lost their original significance, to repeat obsolete formulas in the solution of present day legal problems. It is not correct to refer to such rule-of-thumb deduction as "logic," unless by the term "logic" you refer to the mere mechanics of thought, with no reference whatever to correctness. True logic must seek truth, and we must reject as illogical any result which gives unmistakable evidence of a lack of verity.

The serious aspect of the whole matter lies in the fact that new classes of rights cannot be formed and new rights cannot develop

⁸ So complex have our society and its laws become as to give strong grounds for the contention that this complexity has become tantamount to a denial of justice to those financially unable to employ skilled lawyers to expound those intricacies. Report of Reginald Heber Smith, for Carnegie Foundation, "JUSTICE AND THE POOR," 31-32.

⁹ HARV. L. REV. at p. 245—"Tort and Absolute Liability," cited above. Here Professor Smith cites: MAINE, "ANCIENT LAW," (I ENG. ed.) 27; MAITLAND, "EQUITY AND FORMS OF ACTION," 296; CAMPBELL, "PRINCIPLES OF ENGLISH LAW" (1907), 245; Professor Salmond in 21 L. QUART. REV. at p. 13.

¹⁰ As typical of the language of the courts, see: *K. C. M. & O. v. Shutt*, note 6 above:—"such violation partakes not only of the nature of a tort, but of an implied contract, being in the nature of *assumpsit*."

¹¹ See Corbin, "Quasi-Contractual Obligations," 21 YALE LAW JOUR. 533, 536.

¹² "Lawyers and judges fall into habits of mental indolence and take for granted the absolute correctness of legal rules, and apply them mechanically."—Swayze, "The Growing Law," 25 YALE LAW JOUR. at p. 14.

freely as long as we insist upon referring everything to the old categories for our tests and classifications. Legal institutions ought not forever to be hampered by that historical inversion, in which there was a recognition of remedies first, and legal rights afterwards,¹³ thus casting legal rights in an arbitrarily patterned mold. One of the grievous disappointments awaiting the over-sanguine student of code procedure lies in the discovery of how far the code has missed its great ideal, because of the failure to discriminate between the elements which inhere in rights themselves and those things which were engrafted upon the ideas of rights by the formulary system of the common law. The fact that code procedure appears as an evolutionary, rather than a revolutionary step in legal development may be an explanation of the carrying over of many common law notions, which would better have been discarded, but can be no excuse for the translation of those notions.

The familiar language of Professor Salmond, will certainly bear repetition.¹⁴

"Forms of action are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day. Thus, if we open a book on the law of torts, however modern and rationalized, we can still hear the echoes of the old controversies concerning the boundaries of trespass and trover and detinue and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when the forms of action and of pleading held the legal system in their clutches."

WHAT IS THE FINAL STEP IN THE RECOGNITION OF A LEGAL RIGHT?

As the content of the term "legal right" has already been fixed by careful analysis, it is not considered possible to improve upon the generally accepted definition, which may be paraphrased as follows: A right is that capacity, recognized or created by law, in one individual to influence the conduct of others, to effectuate

¹³ STREET, "FOUNDATIONS OF LEGAL LIABILITY," Vol. III, p. 3.

¹⁴ 21 L. QUART. REV. 43.

which the power of the state may be invoked.¹⁵ Or to use the language of BOUVIER'S LAW DICTIONARY.

"The idea of claim and that the claim must be well founded always constitute the idea of right. . . . The idea of a well-founded claim becomes in law a claim founded in or established by the law, so that we may say that a right in law is an acknowledged claim."

Professor Salmond says:¹⁶

"It is to be noticed that in order that an interest should become a legal right it must obtain not merely legal protection, but also legal recognition."

The element here to be emphasized is that the condition precedent to the existence of new rights is the fact of recognition. That the development of society continually forces the recognition of new rights can be thoroughly demonstrated by a consideration of the changes which have occurred in the law regarding business competition, during the past fifty years. Any fixed or inelastic classification, then, must be a stumbling block to advancement, and any test which secures all its categories from the past is bound sooner or later to be found barring the way to further advances. As pointed out by many eminent writers, the common law classifications did warp the law of the past, which was serious enough, but to permit the law of the future to be twisted awry by past errors is immeasurably worse. This historical test by which we allow or deny rights depending upon whether they do or do not accord with past conceptions allows for no mistakes of classification, and can cloak itself behind nothing more substantial than a plea of uniformity. To which it must at once be said that it is a poor kind of consistency which can be attained only by the perpetuation of mistakes. Consistency is, of course, necessary in any system of laws, but care must be taken to see that it is a real and not an apparent consistency which we have attained. If we cannot change the past we can at

¹⁵ POUND, "READINGS IN THE HISTORY AND SYSTEM OF THE COMMON LAW," 413.

SALMOND, "JURISPRUDENCE," (3d. ed.) 184-187.

POLLOCK, "FIRST BOOK OF JURISPRUDENCE," (3d. ed.) 63.

AUSTIN, "JURISPRUDENCE," (5th ed.) Vol. I, 282-285.

HOLLAND, "JURISPRUDENCE," (11th ed.) 82.

MARKBY, "ELEMENTS OF LAW," (6th ed.) 92-93.

¹⁶ "JURISPRUDENCE," 186.

least do what we can to modify the effect of that past upon our future.

While you can not say positively that a right exists until the power of the state (presumably through a court) can be exercised in its behalf,¹⁷ it is going one step too far to say that since no known form of action lends itself to the securing or protection of the right there is no right which it is possible to recognize and it is clearly a misconception of the law in code states which have declared that "common law forms of action have been abolished, but common law causes of action have not,"¹⁸ which permits such a statement to be, either directly or impliedly, construed into a statement to the effect that the causes of action recognized at common law contain all of the kinds of rights which may be recognized under the codes.¹⁹

CAUSES OF ACTION: EFFECT OF HISTORICAL PROCEDURAL NOTIONS UPON THEIR DEFINITION

In view of the fixed conservatism of the legal profession it is not surprising that the coming of code pleading should have been received by two distinctly opposed factions.²⁰ One of these feared wide innovations as threatening to break down the whole system of the law. The other hailed code procedure as a panacea for juristic ills. The one clung steadfastly to the system of fixed actions as the guide and teacher of their lives, while the others, too optimistically, perhaps, foresaw a completely rational re-classification of legal rights resulting from the removal of the trammels of fixed forms of action.

The natural result of the clash between these two ideals has been a crop of anomalous positions which are not consistent with either the spirit of the code or the technical exactness of the older system. One of the better examples of the effect upon the definition of legal ideas is found in the application of the term "cause of

¹⁷ SALMOND, "JURISPRUDENCE," (3d. ed.) 335-336 (*Damnum sine injuria*); PHILLIPS, "CODE PLEADING," secs. 27, 389, 390.

BLISS, "CODE PLEADING," (3d. ed.) sec. 113.

¹⁸ PHILLIPS, "CODE PLEADING," sec. 162; BLISS, "CODE PLEADING," secs. 5, 6; POMEROY, "CODE REMEDIES," secs. 4-14; and notes under all of the above sections.

¹⁹ The difficulty with the classification by actions at common law lies in the fact that those actions were not mutually exclusive. See Corbin, "Waiver of Tort, etc.," 19 YALE LAW JOUR., 221, 223.

²⁰ POMEROY, "CODE REMEDIES," sec. 15 and notes.

HEPBURN, "HISTORY OF CODE PLEADING," secs. 81-83.

action," which Mr. Phillips points out²¹ has suffered in its wording a loss of exactness. The term, he says, can be applied only when called a "cause *for* action."

Here we find two distinct points of view, both of which find expression in the English case of *Brunsdon v. Humphrey*,²² which has received much attention from the American courts. In that case the plaintiff was injured by the negligence of the defendant's servant, who drove a van against the plaintiff's cab, damaging it and at the same time injuring the plaintiff. In a previous action the plaintiff had recovered some four pounds for injury to the cab and that judgment is here pleaded in bar of the action for the personal injury. The trial court held the judgment to be a bar, on the theory that there was but a single wrong. On appeal, the court was called upon to decide whether there was more than a single cause of action involved. The court, speaking through Bowen, L. J., says, in part:

"According to the old distinctions of forms of action which still have a historical value as throwing light upon the principles and definitions of the common law, the forms of action upon such an hypothesis would have been trespass to the person for personal injury, trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in English and in the Roman law. . . . Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving of itself, if accompanied by no injury to the plaintiff, was not actionable at all for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong also occurred as soon as the driving also caused injury to the plaintiff's person. Both causes of action in one sense may be said to be founded on the act of the defendant's servant, but they are not on that account identical causes of action."

²¹ "CODE PLEADING," sec. 31.

²² L. R. 14 Q. B. D. 141 (C. A.)—(1884), 53 L. J. Q. B. N. S. 476, 51 L. T. N. S. 529, 32 Weekly Rep. 944, 42 J. P. 4.

Lord Coleridge, C. J., dissented vigorously, using the following language:

"It appears to me that whether the negligence of the servant or the impact of the vehicle, which the servant drove, be the technical cause of action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him at one and the same moment, by one and the same act, in respect of different rights (i. e., his person and his goods), I do not in the least deny; but it seems to me a subtlety not warranted by the law that a man cannot bring two actions if he is injured in his arm and his leg, but can bring two, if besides his arm and his leg being injured, his trousers which contain his leg and his coat sleeve which contains his arm have been torn."

It will be observed that Lord Coleridge is referring to physical causation and not to the legal cause of action, and that he has used the term "plaintiff's person" with the most extreme exactness and does not include within it even those things which are so closely associated with one's person as to *reasonably* be considered a part of it. The exact line is, of course, hard to draw upon this test of reasonableness. Still, it is no more difficult to make such a discrimination upon that ground than it is to determine what the "*unwarranted* application of force" shall amount to in order to be an actionable interference with one's person. Hard cases do make bad law, but they do so quite as often because of the failure to make reasonable distinctions or definite analysis, as they do because of excited sympathies. Close discrimination is not always "unwarranted subtlety."²³

The case of *Brunsdon v. Humphrey* seems to reflect well the two

²³ It ought to be reasonably clear that there is a difference in relationship between a man and the clothes he is wearing, as compared with a bundle of clothing or other property of which he may be possessed, though even here it is arguable in technical strictness that there is no difference. But is there a difference between the case where a train hits a drove of cattle and negligently kills five of them, and the one where the train through the same basic negligence kills five animals each a mile from the next one, and the possible case where one animal was killed because of the same negligence on each of five days? Metaphysically speaking the only difference lies in the lengthening of the interval of time and space. As a matter of "every day common sense" there is a decided difference. Lord Coleridge invokes the very subtlety of which he complains.

divergent attitudes. With proper respect for traditions and historical development Justice Bowen carefully observes the analysis of a cause of action into its proper elements; (a) the right of the plaintiff, (b) the duty of the defendant, and (c) the wrongful act of the defendant which produced the breach of that duty. He does not permit his analysis to be led astray by procedural tests or matters of supposed better policy. On the other hand, starting with a misapplication of the term "cause of action," which he takes to mean the particular act which precipitates the law suit²⁴ Chief Justice Coleridge proceeds to misapply the maxim, "*Nemo debet bis vexari pro una et eadem causa.*" There is no rule that a man may not twice be punished for the same *act*. The rule provides for a single punishment for a single *wrong*, and a wrong is the violation of a right. The conclusion of the majority of the court must be taken as the better reasoned, while the dissent can be charged with an unwarranted shift of emphasis in magnifying the importance of the wrongful act. Because of the remedial elections open under the older system, it was easy to lay the stress where Chief Justice Coleridge has here placed it, and to fail to recognize in those actions in which actual damage is the gist of the wrong, that loss is after all, not the only important element involved. Damage or loss, as such, is nothing. Neither is important until coupled with some correlative right and duty.²⁵

It is just this attempt to correct a wrong by patching up its results, rather than seeking the source from which that wrong springs that has produced a large number of incongruous situations in our law. Under the formulary system, it must be admitted, the courts were fortunate to be able to deal even with the result in those cases in which the cause was hard to reach because of the classification, or in which the procedure, if one started from the right itself, was inadequate. This inverted attack was, however, adopted in some cases in which it might have been avoided, with the result that the spurious remedy, thus created caused the recognition of pseudo-rights, having no real relation to the exact wrong done or the true

²⁴ *Ochs v. Pub. Serv. R. C.* (1911), 81 N. J. L. 661, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912 D, 255, overruling 80 N. J. L. 150.

²⁵ HOLLAND, "JURISPRUDENCE," (11th ed.) Chap. VIII.

SALMOND, "JURISPRUDENCE," (3d. ed.) 184.

POMEROY, "CODE REMEDIES," (4th ed.) secs. 337, 417.

PHILLIPS, "CODE PLEADING," Sec. 30.

right violated.²⁶ One such field, already referred to,²⁷ is found in the field of quasi-contract.

Justice Coleridge seeks a desirable end in seeking a rule which will minimize the number of law suits that may be brought to redress the wrongs arising out of any single act, but, as there can be no possible objection to a procedural rule under reformed procedure requiring an injured party to join in one suit all the causes of action which accrue to him on account of any single wrongful act of another, there is a most serious objection to the means which he adopts to reach this end. Judge Coleridge would continue to make rights subordinate to procedure. He would compel a *joinder of causes* by breaking down all classifications of rights, fundamental though they might be. He would prefer to extinguish a right rather than vary a rule of procedure. This is striking back into the dark ages of the law with a vengeance!

Writers on jurisprudence have uniformly asserted that the rights of a person over persons and the rights of a person as to property were, of necessity, distinct things.²⁸ A multiplicity of suits is certainly to be preferred to the extinguishment or the merger of necessarily distinct legal rights. Reformed procedure, in England as in America, was supposed to have relegated procedure to its proper position as secondary to legal rights. It is repugnant to modern development to seek again to enthrone procedure and to permit it again to reign as by divine right.²⁹

In America, the dissent of Lord Coleridge has received probably more approval than the majority opinion.³⁰ This reception would seem from an opinion³¹ rendered many years before the case of *Brunsdon v. Humphrey*, was due to an already existing failure to recognize fundamental rights as such. In that case the court says:

"It is a complaint in which the plaintiff has made the neg-

²⁶ Corbin, "Waiver of Tort and Suit in Assumpsit," 19 YALE LAW JOURNAL, 221-224, 235.

²⁷ See note 6, above.

²⁸ HOLLAND, "JURISPRUDENCE," (11th ed.) 132-140.

SALMOND, "JURISPRUDENCE," (3d ed.) 190.

POUND, "READINGS, ETC., IN THE COMMON LAW," 420.

MARKBY, "ELEMENTS OF LAW," (6th ed.) secs. 161-167.

AUSTIN, "JURISPRUDENCE," (5th ed.) 367 ff.

²⁹ For a discussion pointing out the inherent fallacy in the position taken by Chief Justice Coleridge, see PHILLIPS, "CODE PLEADING," secs. 30, 31, 440, 441. Particular attention is called to the note under section 30.

³⁰ See notes: 50 L. R. A. 161; 36 L. R. A. (N. S.) 240; Ann. Cas. 1912 D. 255.

³¹ *Howe v. Peckham*, (1851), 10 Barb. 656; 6 How. Pr. 229.

ligence of the defendant the ground of action, and in which the damage both to the plaintiff's person and his property are claimed as the consequence of the negligence or as resulting from the negligence complained of. . . . The party injured has an election either to treat the negligence of the defendant as the cause of action and declare in case or to consider the act itself as the injury and declare in trespass."

At this point let it be remarked that the election referred to is purely remedial in its nature and that it has nothing whatever to do with fundamental rights.³² The shadowy border-land lying between case and trespass was created by the joint action of the arbitrary limitations of the formulary system and the rapid expansion of "case" after the Statute of Westminster II. The wrong involved is the invasion of the right over property or the right to personal immunity from harm, and its existence does not necessarily depend upon either the element of directness of force or that of negligence of action. In fact, the element of negligence was seized upon to permit the action of case to be brought. The result in the instant case is that the court is misled into the notion that a different right is involved where the *negligence* is treated as the cause of action from that in which the *act itself* is considered the cause of action. Here we have the key to the shift in emphasis which, in *Brunsdon v. Humphrey*, led Chief Justice Coleridge astray, as it has many of the American courts. The opinion proceeds:

"The running against the plaintiff's carriage in the highway, and breaking it and upsetting the plaintiff and injuring him by the careless negligence of the defendant, never constituted but one cause of action, and for which the plaintiff recovered his damages as well for his personal injury as for injury to his property. This is a salutary rule for when injury has resulted both to the person and the property of the plaintiff from one single act of negligence of the defendant the law ought not to be guilty of so great folly as to compel the plaintiff to sustain the burden and expense of two suits to recover his damages."

The "folly," if any be present, belongs to the court. The fact

³² "The practice sometimes indulged in even by courts in their solemn judgments of retaining the ancient nomenclature and of describing a given cause as "trespass," "trover," "assumpsit" and the like is productive of confusion and confusion alone."—POMEROY, "CODE REMEDIES," (4th ed.) sec. 49.

that the rules as to joinder of causes, which were in force at the time of this case, might require two suits is certainly not a sufficient excuse for wiping out fundamental legal classifications. If there was a serious multiplicity of suits, the legislatures should have been depended upon to remedy the difficulty, when it was called to their attention. The court should have refrained from legislating. Further, the very reason for the rule regarding the joinder causes, referred to by the court as producing a multiplicity of actions for one "wrong," is the fact that there are two wrongs involved, which are essentially different in their nature. The fact that there is such a statute forbidding their union is conclusive evidence of legislative intent to recognize and keep distinct the two kinds of rights.³³ The position of this court is therefore wholly inconsistent.

This case of *Howe v. Peckham* is typical of perhaps the greater number of American cases, but in none of the cases reaching this conclusion are there any serious attempts to analyze the rights involved,³⁴ the courts being content usually to announce that there

³³ This precise application was made in the case of *Schermerhorn v. Los Angeles Pac. R. Co.* (1912), 18 Cal. App. 454, citing: *Lamb v. Harbaugh*, 105 Cal. 680, (1895), and *Thelin v. Stewart*, 100 Cal. 372, (1893).

³⁴ The cases most often cited are:

King v. C. M. & S. P. R. Co. (1900), 80 Minn. 83, 81 Am. St. Rep. 238, 50 L. R. A. 161 and note.

Kimball v. L. & N. R. Co., 94 Miss. 405 (1909).

McAndrew v. L. S. & M. S. R. Co. (1893), 70 Hun. 46, 23 N. Y. Sup. 1074.

Rosenberg v. Staten Island R. Co. (1891), 38 N. Y. S. Rep. 106, 14 N. Y. Sup. 476.

Doran v. Cohen (1888), 147 Mass. 342.

Broithwaite v. Hall (1897), 168 Mass. 38.

B. & O. R. Co., v. Ritchie, 31 Md. 191.

Cole's Admr. v. Ill. Cent. R. Co. (1905), 20 Ky. 686.

Wheeler Savings Bank v. Tracy, 141 Mo. 252, 64 Am. St. Rep. 505.

Von Fragstein v. Windler (1876), 2 Mo. App. 598.

Stickford v. St. Louis (1879), 7 Mo. App. 217.

Lamb v. St. L. C. & W. R. Co., 33 Mo. App. 489.

Mobile & Ohio R. C. v. Matthews (1896), 115 Tenn. 172.

Bliss v. N. Y. C. & H. R. R. Co. (1894), 160 Mass. 447, 64 Am. St. Rep. 504.

In the case last cited, the authorities given seem not to be in point, since in each of them the injury arose from a single act by which a number of articles, of the same nature, in a group were converted. Only one right, the right over property, was violated and these authorities are not the best of support where the rule is to be extended to a case in which two kinds of property and two distinct kinds of rights are involved.

A case frequently cited in support of *Howe v. Peckham* (6 How. Prac. 229) is *Chicago West Div. R. Co. v. Ingraham* (1890), 131 Ill. 659. This case turns upon a pure question of pleading and not upon any question of substantive rights. It might readily be argued in opposition to rather than in support of that case. The *Ingraham* case holds that since, where both the plaintiff's property and his person were injured by the same wrongful act, the plaintiff, at his option, could have brought wholly separate suits, or could have combined the two in one action, by placing them in separate counts, it was only a formal defect (duplicity) to have merged them in a single count. As the de-

can be only one suit for a single wrongful act, leaving it to the reader to guess whether they have been led astray by procedural expediency, or by historical misconceptions, or both, though now and then a court frankly admits that its decision is based upon mere expediency.³⁵

The leading American case following *Brunsdon v. Humphrey* is the case of *Reilly v. Sicilian Asphalt Company*,³⁶ which, overruling previous contrary decisions, holds:

"While some of the difficulties in the joinder of a claim for injury to the person and one for injury to property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice Bowen has pointed out³⁷ that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods or vice versa."³⁸

The rule of the California case of *Hutchinson v. Ainsworth*³⁹ offers the only test which may safely be used if any logical classification of legal rights is to be attained.

fendant pleaded merely the general issue he was held to have waived the right to object to a matter of form. This case does *not* hold that there is but a single cause of action.

Foss v. Whitehouse (1901), 94 Me. 498, presents interesting facts. Plaintiff was arrested and placed in jail for failure to pay taxes which he claimed he had already paid. To secure his release he finally did make the payment demanded. Thereupon, he brought two actions: (1) to recover the money so paid, and (2) to recover damages for the imprisonment. The court held a recovery in the first case to be a bar to the second action, treating the extortion as aggravation of the imprisonment. It is not difficult to find fault with this decision, since the plaintiff is the only person who has the right to merge the extortion into and treat it as aggravation of the arrest and imprisonment, which preceded it.

³⁵ *Mobile & O. R. Co., v. Matthews* (1906), 115 Tenn. 172.

³⁶ (1902), 170 N. Y. 40, 57 L. R. A. 176, 88 Am. St. Rep. 636, overruling: 43 N. Y. Sup. 536, 14 App. D. 242; and 52 N. Y. Sup. 817, 31 App. D. 302.

³⁷ In *Brunsdon v. Humphrey*, cited in note 22 above.

³⁸ Accord: *Watson v. Texas & Pac. R. Co.* (1894), 8 Tex. Civ. App. 144.

Ochs v. Pub. Serv. R. Co. (1911), 81 N. J. L. 66, 36 L. R. A. (N. S.) 240, and note.

King v. Railway Co. (1906), 126 Ga. 794, 8 L. R. A. (N. S.) 544.

Boyd v. Atlantic Coast L. R. Co. (1914), 218 Fed. 653.

Eagan v. N. Y. Transp. Co. (1902), 39 Misc. 111, 11 N. Y. Ann. Cas. 394, 78 N. Y. Sup. 209.

Schermerhorn v. Los Angeles Pac. R. Co. (1912), 18 Cal. App. 454.

³⁹ 73 Cal. 452.

"The facts upon which the plaintiff's right to sue is based and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong make up *the cause of action*. If these facts, taken together, give a unity of right, they constitute but one cause of action."

Tests based upon procedural history or upon past procedural convenience must be abandoned, if it is at all possible to do so.

PROMISES IMPLIED IN LAW: THEIR CONFUSION WITH ACTUAL PROMISES

After the discussions of this subject by Professors Ames,⁴⁰ Corbin,⁴¹ and Smith,⁴² there remains very little indeed that can profitably be said without unnecessary repetition, about the function of this fiction.

Attention is called to the statement by Professor Ames in the article referred to:

"The history of assumpsit, for example, though the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediaeval conceptions."

It is, however, desirable to emphasize the origin and function of the promise in law, which is, even now, rather too often mistaken for one variety of actual promise. In the article by Professor Corbin⁴³ it has been clearly indicated that *all* contracts are in reality implied contracts, since a contract depends upon the mental state of the parties, which can be arrived at only by deduction from their words and other acts. Only the contracts implied in fact are to be considered as true contracts and it is to be remembered that the contract implied in law is no true contract of any description.⁴⁴ So far from arising by consent or intention is it, that it can be said never to appear *save against* the will of him who is to be charged, and in its very inception it lacks that element of consent which goes to make up every true contract. The reasons for the invention of the implied promise are to be found in the vogue attained by the action of assumpsit. Its parentage is purely procedural. It was

⁴⁰ "History of Assumpsit," 2 HARV. L. REV. 1, 53.

⁴¹ "Waiver of Tort and Suit in Assumpsit," 19 YALE LAW JOUR., 221.

"Quasi-Contractual Obligations," 21 YALE LAW JOUR., 533.

⁴² "Surviving Fictions," 27 YALE LAW JOUR., 324-327.

⁴³ 19 YALE LAW JOUR., 221.

⁴⁴ Ames, "History of Assumpsit," 2 HARV. L. REV. at p. 63.

brought into existence by the mere fiat of the court, and usually to redress a wrong tortious in nature.⁴⁵ It finds its source in the law of remedies and not in the law of rights.⁴⁶ Historically it exists merely for the purpose of adding elasticity to the administration of law by the courts. It is one of those surviving fictions⁴⁷ for which we are even now paying penalty, because of the tendency to treat it, without careful consideration, as a true contract.⁴⁸ Such treatment is found in its use as a test of the assignability of choses in action under statutory provisions forbidding the assignment of a "thing in action not arising out of contract,"⁴⁹ and as permitting the right to "waive the tort and sue in contract."

The reason for the existence of the contract implied in law was well stated by Mr. Swayze:⁵⁰

"We hold men to implied contracts,⁵¹ but the implied contract is a mere fiction devised by the courts of law to do justice where justice is impossible in the strict conception of contract or tort. As in the earlier days the action of assumpsit was based upon the theory of a tort and by means of a fiction a recovery was permitted upon the theory that the failure to perform the contract was in the nature of trespass, so we have come to allow a recovery when money ought to be paid *ex aequo et bono* upon a fiction of a contract that never existed."⁵²

⁴⁵ WOODWARD, "QUASI-CONTRACTS," SECS. I, 4.

⁴⁶ KEENER, "QUASI-CONTRACTS," 14.

⁴⁷ See 27 YALE LAW JOUR., 324 ff, where Professor Smith cites copious authorities in this field.

⁴⁸ "Since like contracts proper they (promises implied in law) were enforced by means of the action in assumpsit, it is not surprising that in a period in which more importance was attached to forms of action than to the nature of substantive rights the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error and in many cases has wrought serious injustice. It can not be too strictly emphasized, therefore, that quasi-contracts are in no sense genuine contracts."—WOODWARD, "QUASI-CONTRACTS," section 4.

"Had not this almost self-evident proposition (that in waiving the tort and suing on the promise implied in law, the act does not cease to be tortious) been lost sight of, because of the fiction of a promise involved in the action of indebitatus assumpsit when brought to enforce a right of action not resting on a contract, much of the confusion in and conflict of decisions now existing would have been avoided."—KEENER, "QUASI-CONTRACTS," 160.

⁴⁹ See note 6, above. Similar examples found in *Kansas Midland R. Co. v. Brehm* (1895), 54 Kans. 755, and *Challiss v. Wylie* (1886), 35 Kans. 506.

⁵⁰ "The Growing Law," 25 YALE LAW JOUR. at p. 4.

⁵¹ Clearly this must mean contracts implied in law.

⁵² See, also, AMES, "HISTORY OF ASSUMPSIT," 2 HARV. L. REV. at p. 14.

With a majority of our states announcing in their codes of civil procedure that all forms of action have been abandoned and all fictions in pleading abolished, it would seem that the fiction of the promise implied in law should lose some of its standing in the courts, and certainly should not be extended in the slightest degree beyond its present bounds. Reformed procedure has largely removed the need for this "mediaeval conception," which being false in its very inception should be cast out as soon as its purpose is served. From the standpoint of the exact recognition of basic rights it is to be regretted that our courts have not more carefully observed the admonition of Lord Mansfield, who may be given almost sole credit for the wide use made of the implied promise.⁵³

"But fictions of law hold only in respect of the ends and purposes for which they were invented: when they are used to an intent and purpose not within the reason and purpose of the fiction, the other party may show the truth."⁵⁴

Many of them would have great difficulty in telling us just why they invoke a falsehood when the truth would do better, and why, they retain an obstacle to symmetrical classification, which tends by giving an erroneous reason, to prevent the investigation of fundamental principles underlying rules of law.⁵⁵

WAIVER OF TORT: A NEEDLESS ANOMALY

This judicial falsehood continues to be used widely in what appears to be a growing field, despite the fact that its extension in this direction was never demanded by any true necessity. The courts seem more and more inclined to invoke in their decisions this anoma-

⁵³ "Finally under the influence of Lord Mansfield the action (on the implied promise) was so encouraged that it became almost the universal remedy where the defendant had received money which he was obligated by ties of natural justice and equity to refund."—AMES, "HISTORY OF ASSUMPSIT," 2 HARV. L. REV. at p. 68.

⁵⁴ *Morris v. Pugh*, 3 Burr. 1243.

⁵⁵ Smith, "Surviving Fictions," 27 YALE LAW JOUR., 148.

"There are several fictions still exercising powerful influence upon English jurisprudence. . . but there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now, among other disadvantages, legal fictions are the greatest obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. . . Here there is at once a difficulty in knowing whether the rule which is actually operative should be cast in its true or its apparent place, and minds of different casts will differ as to the branch of the alternative which should be selected."—MAINE, "ANCIENT LAW," (10th ed.), pp. 26, 27.

lous "waiver of tort and suit on contract" doctrine, which seems now to be permanently imbedded in our law. However, if in the law today there is any field, which, more than another, seems to contain a fiction that has lost any utility it may ever have possessed, that has outlived the supposed procedural needs which brought it into being, that has always served as a clog on clear analysis and logical classification, that tends to prevent an investigation of fundamental principles, that, by giving an erroneous reason, makes it harder to understand and apply the rule of law involved, the field is the one in quasi-contract commonly designated "waiver of tort."

The cases in the field of quasi-contract can be divided into two main types. One type arises because a new right or duty is struggling for recognition. The other type arises because, struck by a mere surface similarity, the courts have carried over a false procedural method to a field in which its adoption was wholly unnecessary. The second field is the field of "waiver of tort." The first comprises, at present, all the other obligations arising out of unjust enrichments.

Of the origin of quasi-contracts Professor Keener says:⁵⁶

"The question naturally arises why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law but in the law of remedies.

"The only forms of action known at common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress unless the facts would support a bill in equity.

"Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. . . . The insuperable difficulty of proving a promise where none existed was met by the statement that 'the law implies a promise.' The statement that the *law imposes the*

⁵⁶ "QUASI-CONTRACTS," 14.

obligation would not have met the situation since the action of *assumpsit* presupposed the existence of a promise."

With this sort of a history what is more natural than that the courts should seize upon the procedural test as the earmark of the underlying right and, without investigating the nature of the rights underlying the so-called "unjust enrichment," proceed by the same forms in all cases where ingenuity could find a way to construe an implied promise from the facts in hand?⁵⁷ This was the line of least resistance, for

"It is easier for the courts to say that a man is bound to pay because he must be taken to have promised, than to lay down for the first time the principle that he is bound to pay whether he has promised or not."⁵⁸

It is evident that one of the reasons for the use of fictions was to cloak the fact that the court was legislating, or to conceal an inconsistency produced in the law by the new rule.⁵⁹ What were the considerations which moved the court to apply the equitable theory that one should not be permitted to profit by his wrong to a field already sufficiently covered by the actions of *replevin*, *trespass* and *trover*? If the owner desired restitution of his property he could use *replevin*. If he wished damages for interference with his chattel or land he might bring *trespass* action. If he sought the value of his goods appropriated by another the action of *trover* was open. The antecedents of the rule are apparently shrouded in doubt.

"The equitable principle which lies at the foundation of the great bulk of quasi contract, namely, that one shall not unjustly enrich himself at the expense of another has established itself very gradually in the common law. Indeed, one seeks in vain today⁶⁰ in the treatises upon the law of contract for an adequate account of the nature, importance and numerous applications of this principle."⁶¹

⁵⁷ "Incidentally, it must be noted that this resort to fiction sometimes relieved the court from giving reasons for the existence of an obligation (from inquiring carefully into reasons for imposing absolute liability.)"—Smith "Surviving Fictions," 27 *YALE LAW JOUR.* at p. 326.

⁵⁸ SALMOND, "JURISPRUDENCE," (3d ed.) 440.

⁵⁹ MITCHELL, "THE FICTIONS OF THE LAW," 7 *HARV. L. REV.*, 249, 262.

⁶⁰ This was written in 1888. The texts by Professors Keener and Woodward have since appeared.

⁶¹ AMES, "HISTORY OF ASSUMPSIT," 2 *HARV. L. REV.* at p. 66.

At the time of an article by Professor Wigmore⁶² the field now designated as the "waiver of tort" was either not recognized as a division of quasi-contracts or else that writer considered its inclusion improper. In that article he says:

"A quasi-contract right or a right of restoration is the right to obtain restoration of a benefit or the equivalent thereof *conferred* by the claimant, but unjustly detained by the defendant."⁶³

Further, in this article he points out that the quasi-contract arises in three classes of cases:

(A) MISRELIANCE: The injured party acted because he was misled by the apparent relations of the parties.

(B) COMPULSION: Where a contract, obtained through compulsion is set aside, recovery is to be had for any payments which may have been made.

(C) CIRCUMVENTION: Fraudulent dealing by the defendant by which he has gained a benefit.

The use of the word "conferred" and the choice of the classification as indicated, in which the volitional element on the part of the person who claims restitution is clearly apparent, indicates to the present writer that Professor Wigmore then believed that quasi-contractual obligations arose only when the one now claiming restitution, parted with his property *voluntarily*, and that where it was taken from him against his will only a tort existed. This, in the mind of the present writer, is the only logical view.

There is ample argument to show that the commonly accepted notion that there is a right to waive the tort and sue in assumpsit is decidedly illogical.

1. *The tort cannot be waived.* It is the universal opinion of writers on this subject that the tort can never be dispensed with; that it must always be present as the "inducement" for the implied promise.⁶⁴

⁶² "A Summary of Quasi-Contracts" (1891), 25 AM. LAW REV., 695.

⁶³ See note 62.

⁶⁴ "The tort is, however, waived only in the sense that a party having a right to sue in tort or assumpsit, will not, after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election, that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is entitled to recover. There being no contract

2. *Disseisin: Plaintiff's rights do not change.* If Professor Ames is right in his doctrine of disseisin of chattels⁶⁵ the owner of a chattel ceases to be the owner whenever the chattel is taken from his possession, and has in its stead only a chose in action. If he has ceased to be the owner and has only a chose in action which will be satisfied by the return of the chattel or its equivalent, then it is clear that his *right of action must be defined at the instant of the taking* and that it can not be changed by anything the wrongdoer may do with the property subsequently.

3. *Plaintiff's injury is a constant factor.* It is evident that if B is deprived of his chattel by A's act, he is injured in exactly the same way in each of the three possible cases, viz., (a) A takes B's chattel and sells it, appropriating the proceeds, (b) A takes B's chattel and retains it, and (c) A destroys B's chattel. In the first case B is generally permitted to rely upon the invasion of his property right or may sue upon the fictitious promise implied in law. In the second case he probably has the same election, though writers on this subject seem to have had some doubts.⁶⁶ In the third case he can base his action solely upon the invasion of his property rights. Either this is illogical or writers on jurisprudence have been sadly in error. The right invaded was the right of property. When this right was broken it ceased to be a right and became a chose in action; a new right, by which the former owner is entitled to recover the property, if it be recoverable, or its value. If thereafter there was no contact between the former owner and the wrongdoer, it is hard to see how any new or different obligation arises, merely because of something which the wrongdoer did after he

between the parties, unless the defendant is guilty of some wrong, the plaintiff can establish no cause of action against him."—KEENER, "QUASI-CONTRACT," 160.

"The phrase 'waiver of tort,' commonly used to denote the election of assumpsit, is unfortunate. It implies that the *wrong* is waived, which is both inaccurate and misleading."—WOODWARD, "QUASI-CONTRACTS," sec. 271.

"In such cases as this it must certainly be admitted that the obligation arises out of a tort. But for the defendant's tort he would be under no obligation; and the plaintiff must allege and prove the commission of the tort in order to win his case, whether his action is in trover, or trespass, or assumpsit."—Corbin, "Quasi-Contractual Obligations," 21 YALE LAW JOUR., 533, 537.

"No trick or ledgerdemain on the part of the plaintiff can change the tort into a contract. Neither can the law do this. The law may allow new forms of action and may call things by new names, but it cannot turn a theft or other conversion of goods into an innocent agreement to sell and buy."—Corbin, "Waiver of Tort," etc., 19 YALE LAW JOUR., 221, 226.

⁶⁵ See the article under that title, 3 HARV. L. REV., 23.

⁶⁶ KEENER, "QUASI-CONTRACTS," pp. 192-195 and cases there cited.

had completely lost contact with the former owner, whose injury is not by such an act varied in the slightest.

4. *Statute of Limitations.* The statute of limitations forces the recognition of a further inconsistency, upon which there is a divergence of opinion. The period of limitation upon contract actions (the implied promise) is longer, usually, than that fixed for tort actions. This led Professor Keener to hold that suit might be brought upon the promise after the action upon the tort had been barred.⁶⁷ It was also his opinion that the unjust enrichment dated from the sale or barter of the property taken thus extending the period far beyond the normal limits of either the limitation on contracts or that on torts. The basic incorrectness of this position has already been made clear by Professor Corbin,⁶⁸ who points out that since the former owner's rights were but once invaded, there can be but one period of limitation, logically speaking, and that must be the one applicable to the tort action.

5. *"The doctrine of waiver of tort is simply the election of remedies."*⁶⁹ It being conceded that there was only one violation of a right, and that that violation was a tort,⁷⁰ the only question which confronted the common law jurist was the question of what form of action to choose. The fictitious promise was invented to give him a further choice. It is probable that there was no misunderstanding of the purpose and effect of this fiction when it was first used. However, the evil and inveterate habit of our lawyers has been to continue to describe the new things in the terms of the old, and then to clothe the old terms with some of their old meaning, and to add in this way elements not belonging to the new rights at all. Nothing has been more common than to lay hold upon a chance turn of ancient procedure and with it to demonstrate the existence or non-existence of legal rights. There can be no question that our modern assertion that the wronged party *acquires a new right* because of the unjust enrichment of the tortfeasor is nothing more than a process of legitimatizing the natural offspring of a mismated

⁶⁷ "QUASI-CONTRACT," 177 ff.

⁶⁸ 19 YALE LAW JOUR., 221, 236, 237.

⁶⁹ KEENER, "QUASI-CONTRACT," 159.

⁷⁰ "With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi contractual relation is waived. It is usual to speak of waiver of tort only for the reason that the remedy in tort is the older." Keener, "Quasi-Contracts" 159. But this statement can be correct only when limited to a procedural choice and cannot be extended to mean a choice between actually co-existent rights.

procedural pair. The implied promise came into existence as an aid to procedure, to protect and redress rights already infringed, not to declare new rights. We have here, then, one of those characteristic, and rather too-frequent blunders, in which form is mistaken for substance.

6. *Obligations may exist without rights, but rights cannot exist without obligations.* Writers and judges have been prone to declare, as above indicated, that waiver of tort and suit upon the implied promise finds its basis in a new right. The argument upon which this conclusion is based is that the party who is enriched at the expense of another "ought" to pay back the enrichment. From this we have argued backward, upon the fallacious notion that behind an obligation (here assumed) there *must* be a right. But for the misleading effect of procedural forms this inversion could not have taken place, for if the deduction commences with the primary right, as it logically must, no such secondary right can be conceived of. From this angle such a right is as much out of place as is the "fourth dimension" to the average layman, and equally without use. Yet the statement is constantly made that a new right has arisen. The writer feels that this is wholly untrue, and that it is impossible for such a right as is thus asserted ever to have arisen in a scheme of rights not ruled by arbitrary procedural conceptions.

7. *The true basis of the doctrine of unjust enrichment* is the feeling that no man should be permitted to profit by his wrong. The implied promise was invented to prevent this unjust enrichment in cases where there was no existing remedy. Being equitable in its nature, it should, like other equitable doctrines, not be invoked where there was already a direct and adequate remedy in tort. The excuse for the fiction fails,⁷¹ and it should therefore find no application in a field, where the identical relief introduced by the employment of the fiction, viz., compensation in money already existed. This reason alone should have rendered the recognition of "waiver of tort" impossible.

8. *The waiver of tort doctrine merely provides two measures of damage where but one existed before.* As pointed out by Professor Woodward,⁷² it is more logical to say that there is only one primary obligation that is violated, and that the injured party has

⁷¹ KEENER, "QUASI-CONTRACTS," 211.

⁷² "QUASI- CONTRACTS," sec. 270.

two measures of redress, commonly called "damages" and "restitution." The pairing of these two terms is the unfortunate result of the misconception of the effect of procedure upon substantive rights. The word "restitution" is prejudicial to clear analysis. If there is but one right violated, such as the possessory right in a chattel, the owner is immediately invested with a chose in action, and in the case of the chattel may seek to recover the chattel or its value. The return of the *chattel itself* is the only restitution presently possible. If the owner seeks redress in money he is not seeking restitution. He seeks indemnity, and the only question presented refers to the measurement of that indemnity. The owner can say, "The property was reasonably worth so much to me," and can use this as his measure of indemnity. Or he can say to the wrongdoer, "You have benefited so much by appropriating my property. You can not deny that its value was as much as you have benefited." Then the "enrichment" measures the recoverable amount. Whatever may have been the situation in the past, this is obviously more in harmony with modern conceptions and classifications, than is the customarily announced rule of dual rights.

Professor Corbin has expressed "grave doubts as to the propriety of this doctrine" of waiver of tort.⁷³ This is mild language to apply to a doctrine which never had more than the very slightest justification, the existence of which can be explained only as one of the illogical conditions produced by misapplied historical tests in determining legal rights.

Whole-hearted agreement must be accorded the statement by Professor Keener, that:⁷⁴

"The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right."

And Professor Corbin's statement⁷⁵ should receive equal approval:

"In jurisdictions where the old forms of action have been

⁷³ 19 YALE LAW JOUR. at p. 245.

⁷⁴ "QUASI-CONTRACTS," 16.

⁷⁵ 19 YALE LAW JOUR. at p. 246.

abolished, there should be nothing whatever left of the old doctrine excepting a few historical echoes."

The difficulty lies, however, in the fact that in the jurisdictions having reformed procedure we are still harking back to the ancient tests without proper regard for their present day value. We continue to use the ancient and unnecessary phraseology and to perpetuate the errors of the past.

CAN A LIMIT BE PLACED ON HISTORICAL TESTS?

The tenacity with which set habits have in the law resisted eradication makes one extremely doubtful of the coming of sweeping reforms in classification or analysis. Sixty years of reformed procedure has not materially changed the trend of legal thought in this respect and yet there is here and there a sporadic case which may be taken as an indication that certain modifications are in the making.

The somewhat recent Montana case of *Eisenhauer v. Quinn*⁷⁶ presents an excellent example for our consideration. The problem presented by that case, with details omitted, is approximately this: If A takes B's house and affixes it to C's land, with or without C's knowledge, and C then sells the land to D, a bona fide purchaser, can B replevy the house from D? The Montana court stands almost alone⁷⁷ in its rule allowing the action, and at first glance the case offers a decided shock to the legal sensibilities and the impulse is to condemn the holding without reservation. Further consideration ought to modify the first impression and should point out that much of the aversion to the doctrine announced is due to tendencies inherited from past procedure.

Analysis of the objections places them in two general groups (a) those arising from property law, and (b) objections arising out of procedure.

⁷⁶ 36 Mont. 368, 122 Am. St. Rep. 370, 14 L. R. A. (N. S.), 435 (1907).

⁷⁷ *Russell v. Richards* (1833), 10 Me. (1 Fairf.) 429, 26 Am. Dec. 532, and note.

Hamlin v. Parsons (1866), 12 Minn. 108, 90 Am. Dec. 284.

Shoemaker v. Simpson (1876), 16 Kans. 43.

Central Branch R. Co. v. Fritz, 20 Kans. 430, (semble).

Mich. Mut. Ins. Co., v. Cronk (1892), 93 Mich. 49, (semble).

Mills v. Reddick, 1 Neb. 437.

Huebschmann v. McHenry, 29 Wis. 655, (semble).

Also statements in 2 AM. & ENG. ENCY. OF LAW, Vol. 13, p. 681, and TIFANY, "REAL PROPERTY," 537.

Compare *Elwes v. Mawe* (1802), 2 SMITH'S LEADING CASES (7th Am. ed.) 177, and note thereunder.

Enumerating the objections arising out of property rights:⁷⁸

1. *The house has lost its identity* and cannot, therefore, be specifically recovered. This loss of identity may be a fiction and wholly untrue in fact. It is probably subject to identification and, since it was moved on to the land, it is possible to move it off, unless it has been affixed to that degree that it cannot be removed without excessive damage to the freehold. If it can be so identified and so severed, there is, from a legal standpoint, no insuperable obstacle to permitting it to be specifically recovered.

2. *A bona fide purchaser should be protected* against claims as to which he has no notice. He is not so protected in the purchase of personalty. There is no special sanctity which surrounds a purchaser in good faith, as such. The doctrines of negotiable instruments and equity have had a tendency to place him in rather a higher plane in our imaginations than he occupies in the law. The doctrine of *caveat emptor* still applies to an unattached chattel, and, other things being equal, there is no reason why it should not apply to fixtures capable of identification and removal. Our general conceptions, however, indicate that things are *not* equal in this field, and to date we have favored the purchaser of land as against the equally innocent party who has been despoiled of his personalty. It is easy to see, if the law were to be re-written, we might invoke the other well known doctrine that, if either of two innocent parties must suffer, he who has elected to change his position must bear the loss. On such a theory, it would seem just and proper to say that D, who has reposed trust and confidence, and has, in that trust and confidence purchased from C something which C had no right to sell, should be asked to have recourse to C for recompense and that B, who is wholly innocent and was wholly inactive, should be placed in *statu quo*. To such a solution it is no objection to say that it has never been done, a thousand precedents to the contrary, whether procedural or otherwise, should be unavailing if society has developed to the point where the rejection of the old doctrine of fixation and the adoption of the new rule seems desirable for the promotion of the general good of society. Certainly the suggested position is not without some good features, and much of our ob-

⁷⁸ As it is not intended to argue for or against the validity of any of the substantive rules of property regarding fixtures no authorities upon the existence or non-existence of these rules are here offered.

jection under this head comes from a reluctance to abandon conceptions hitherto accepted.

3. *The rule is contrary to public policy* reflected in the recording acts. We should not compel every purchaser of real estate to trace the lineage and descent of every specific, severable improvement upon the land which he is buying. Upon this point the inquiry becomes chiefly one of fact. Will the use and alienation of real estate be unreasonably impaired by such a rule? Will general development be retarded? Will investments be rendered insecure? Does it require the prospective purchaser to do the impossible and does it place him in a position where he cannot possibly protect himself? Is it so inconsistent with the spirit of the recording acts as to compel its rejection? These and kindred questions involve matters of fact and opinion upon which there may be a difference of judgment, but which really involve little or nothing of legal theory or classification. The question is merely one of the needs of society. The respect for the recording acts is not absolute, at best, and many exceptions already exist. The Montana court must be held to have passed upon these questions and to have resolved therefrom that public policy permitted or possibly demanded the abandonment of the traditional rule regarding fixtures. If issue is to be taken upon this point, it must be remembered that the question is upon a matter of fact and not upon a question of legal theory.

Procedural objections are:

1. *You can not try title to real estate by the action of replevin.* Why? The authorities denying the right are legion.⁷⁹ What of it? It is true beyond question that the action has never been generally so used, but there is no reason, since the formulary system has ceased to be an object of worship, why the action of replevin should not be adapted to any question cognate to the question of possession, and, if in the type of case suggested we suppose in addition that A removed the house from land which B claims to own, there can be no fatal objection to trying B's title to *that* land, incident to the

⁷⁹ As typical of these cases, see:

Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663.

Hines v. Good, 128 Cal. 38, 79 Am. St. Rep. 22.

Anderson v. Halper, 34 Ill. 436, 85 Am. Dec. 318.

King v. Mason, 42 Ill. 223, 89 Am. Dec. 426, with note.

Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466.

Huebschmann v. McHenry, 29 Wis. 655. See for collection of cases:

EWELL, "FIXTURES" (2d ed.) 624 (417); BRONSON, "FIXTURES," 379; 19 Cyc. 1073; 11 R. C. L. 1091; TIFFANY, "REAL PROPERTY," 536, 537.

determination of his right to retake the house. Historically, it was not done, but history should have no conclusive weight where present conditions call for the recognition of new rights or demand new procedural rules and methods.

2. *Some equitable remedy should be invoked*; constructive trust, for example. Why? Is not our objection based upon an unwillingness to modify property laws and to vary the effect of the recording acts? Is there any reason why we should call to our aid another fiction and introduce one more sinuosity into our already over-devious legal paths? If the owner of the chattel has any rights worth recognizing there is every reason for giving that recognition directly, rather than indirectly. There is no reason why we should with time-honored conservatism continue our ancestor worship and again bow down before the formulary system. Such is our first impulse, but it is an inherited trait. There is no excuse for flying to the shelter of equity to escape the ghosts of the past. If there is no proper action at law, why not invent one? Or, if an adaptable one exists, why not adapt it? The old notion of seeking relief in equity merely because the law does not now provide in its defective machinery proper remedies, belongs to the dark ages of our law. It is part and parcel of a very dead, but as yet unburied past.

Therefore, without attempting to attack or justify the conclusion reached by the Montana court, it seems fair to say that the decision shows a commendable freedom from the fetters of precedent; that the willingness of the court to recognize a new right directly and simply and without the camouflage of fictions or the cloak of procedural indirectness augur well for a progressive and sympathetic development and application of the law to meet the needs of the present day.⁸⁰

In conclusion, it is clear, as the foregoing illustrations show, that the purely historical test is unsafe; that its use, even to the extent

⁸⁰ A somewhat similar field is presented by the case of *The Brig Mary Ann*, Fed. Cas. 12,342, 21 Fed. Cas. 432, 2 Sumn. 206, affirmed 3 Pet. 387, 10 L. ed. 213. (1835). This case declares, without giving reasons, that a dispossessed owner has a property right in his chattel, which is something more than a non-assignable chose in action. If followed, this decision would, of course, run counter to the thing which Professor Ames designated "the disseisin of a chattel." (See that subject, 3 HARV. L. REV. 23 and see also "The Inalienability of Choses in Action," SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY, vol. III, p. 507). Here again the desirability and practicability of the doctrine proposed to be substituted must not be judged by conditions of the past. Possession in the law of property, of course, has been a matter of supreme importance, but that is no sufficient reason for saying that, beyond question, it must always remain so.

which has been customary in the past is unwise; that the development of the law must be too slow and often distorted if the ideals of the past are allowed to keep out those of the present. An examination into the history of a rule is valuable as explaining how we reached the point at which we find ourselves, but is certainly no excuse for remaining there forever. In an age of airplanes much of our law still travels by ox-teams, and no small part of that backwardness is caused by an unwillingness to furrow new fields or by an automatic retracing of furrows already drawn in unproductive land. A decent respect for the past we must always have, and an understanding of the development of the law, to the end that we may apply the rules of law in their true spirit. But we have rather too long been content to sit within the Chinese wall of precedent, mumbling prayers to the procedural gods of our fathers. New rights must be developed under new conditions. It must not be considered fatal if these rights are not absolutely in harmony with all of the existing system. When our law becomes wholly harmonious, development will have ceased. And though we in America do echo the sentiment:

"If the English law is ever to assume an orderly distribution it will be necessary to pare away the legal fictions, which in spite of recent legislative improvements are still abundant in it."⁸¹

We must, in all honesty, confess that the assertion that

"the last vestige of the fictitious principle will die out when the need to resort to it has ceased."⁸²

is still nothing more than an unrealized, pious hope, and we also must recognize that legislative fiat has been decidedly insufficient as a means of terminating, or even greatly modifying the untoward influence of past artificial classifications.

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⁸¹ MAINE, "ANCIENT LAW," 27.

⁸² Mitchell, "The Fictions of The Law," 7 HARV. L. REV. at p. 265.